

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities GN Docket No.: 00-185

Internet Over Cable Declaratory Ruling
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities CS Docket No.: 02-52

To: The Commission

REPLY COMMENTS OF THE PARISH OF JEFFERSON
POLITICAL SUBDIVISION IN THE STATE OF LOUISIANA

Patricia S. LeBlanc
LeBlanc, Tusa & Butler LLC
2121 Airline Drive
Suite 405
Metairie, LA 70001

Mark J. Jeansonne
Milling Benson Woodward LLP
909 Poydras St. Suite 2300
New Orleans, LA. 70112-1010

Jefferson Parish, a political subdivision of the State of Louisiana, submits this comment in reply to the comments filed by interested parties, including the comments filed on behalf of Cox Communications, Inc. ("Cox").

Specifically, Jefferson Parish's reply addresses statements in Section VI of Cox's comments wherein Cox avers that the Commission should preempt any and all rights of state and local governments as to cable modem service, regardless of whether delivery of

that service affects publicly owned rights of way and despite indications that providers such as Cox are absorbing a greater share of local government resources as they expand their commercial internet services.

Jefferson Parish acknowledges that the goal of the Federal Communications Commission ("FCC") is "to foster a minimal regulatory environment that promotes investment and innovation in a competitive market." (Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers. CC Docket No. 02-33, Notice of Proposed Rulemaking PP 5-6 (rel Feb 15, 2002)).

On review of information documented in the Cox submission, as well as comments from other similarly situated providers, it is clear that payments to local governments for the management of the rights of way by Jefferson Parish and the use of public rights of way by Cox constitute the only significant 'regulation' at the local level. Further, such payments are a minuscule portion of the overall cost to Cox and other MSO's; they were bargained for rights which are the subject of ongoing contractual (franchise) agreements of long standing affecting other issues potentially compromised by the 'preemption' suggested here; and finally there is absolutely no evidence in the Cox submission or in any other of the numerous comments that collection of the franchise fee has had any deleterious effect on growth or innovation within this relatively new industry. To the contrary, all available evidence supports the contention of Jefferson Parish and that of other local governments that the cable modem service industry has enjoyed dramatic growth at the very same time it has collected and remitted a small 'use' fee for the use of rights of way.

Review of those facts makes it plain that there is no basis for an extension of preemptive federal authority as suggested. Indeed, 'a minimal regulatory environment' is best achieved by allowing existing contractual (franchise) agreements to continue without interference unless or until there is compelling evidence presented that such contractual agreements are onerous or detrimental to further investment and innovation within the industry or to the Commission's goals.

Consider the following evidence presented in the Cox submission: It begins on the first page in the introductory paragraph of its 76 page submission. Cox

describes the growth it has enjoyed prior to introduction of the proposed rulemaking of March 14, 2002.

Clearly the pay day has already arrived:

"Cox's efforts, like those of the other MSO's have paid off: At the end

of the first quarter of 2002, Cox was able to offer residential cable

modem service to over nine million homes, and had over one million cable modem service subscribers."

Thereafter, a major portion of the Cox comment is devoted to its argument against

mandated access requirements. Within that argument, Cox notes that the Commission

should refrain from acting and ordering mandated access in the absence of evidence of

market failure. Cox cites an opinion of the D.C Circuit Court which upheld a Commission

ruling that no action should be taken in the absence of positive proof that a statutory

purpose was at risk. Computer and Communications Industry Ass'n v. FCC, 693 F2d 198

(D.C. Cir. 1982). In that analysis, Cox applauds the Commission decision to "abide by

the fundamental legal principle that 'Commission regulation must be directed at protecting

or promoting a statutory purpose. In some instances, that means not regulating at all,

especially if a problem does not exist.' " See Comments of Cox Communication, Inc., p.

15.

In truth, there is widespread recognition that competition within the internet service

business is healthy and growing. Cox's admissions on that point are spread over the

multiple pages of its comment. Those statements are merely indicative of what each and

every member of the Commission and a majority of Americans already know. The Commissions own files contain multiple documents regarding growth in the industry. The

so-called 706 reports document accelerating growth in broadband deployment. There is

already healthy competition within this sector. In fact, the growth has been extraordinary.

Interestingly, though Cox cites evidence of healthy competition in support of its plea that

the Commission refrain from ordering mandated access, that same logic is noticeably

absent from Section VI of the comment wherein it urges the Commission to take a more

far-reaching and powerful step: federal preemption of any and all action by state and local

government including collection of contractually bargained for right of use fees. Jefferson

Parish respectfully submits that the same arguments made by Cox and other MSO's

against the mandated access requirements are likewise valid arguments

against
Commission action as to the minimal state and local 'regulation' which
preceded the March
2002 rulemaking. Jefferson Parish is not attempting to regulate cable modem
service.
Jefferson Parish is exercising it's right and statutory obligation to
protect and preserve
public property rights. For example, if Jefferson Parish leased land to a
CMRS provider
for wireless telephone service, Jefferson Parish would not be regulating
it's service, it
would, through a contractual agreement with the service provider, be
enforcing it's property
rights.

Collectively those arguments of the MSO's are powerful statements
regarding a
system which is growing and becoming more and more profitable. An exercise
of federal
preemption rights at this point is wholly unwarranted in the absence of
proof of a market
failure or any other empirical evidence of a problem between local and state
governments
and the MSO's with whom they contract.

Cox and others who responded to the Commissions request for comments
routinely
refer to the term 'regulation' and ascribe varying interpretations to that
term as it may be
used by local and state governments. The suggestion is that such
'regulation' places
constraints on further development of cable modem service. As noted above,
there is
absolutely no evidence of same. Furthermore, Jefferson Parish respectfully
suggests that,
prior to a wholesale ban on any 'regulation' by local government, the
Commission should
engage in a further investigation as to the minimal type of 'regulation'
which has been in
place during this period of growth. In this community of 500,000 citizens
the Commission
would find that 'regulation' is nominal and that there is some need for
involvement by local
government to effect valid public policy and consumer oriented goals. That
activity is
essentially two-fold. First since March 27, 1990, Jefferson Parish has
collected a 5% fee
on all gross revenues sold by Cox in Jefferson Parish in exchange for rights
to lay coaxial
cable lines on public property. As detailed in Jefferson Parish's prior
comment, its own
agreement with Cox specifically contemplates delivery of services other than
cable
television service as being subject to the 5% fee. (Article VII, Section 14
of the 1974 State
Constitution prohibits Jefferson Parish from loaning, pledging or donating
any public
property without adequate compensation.)

Since 1990, and well beyond the time when Cox began providing cable

modem

service, the 5% fee had been voluntarily paid by Cox. It allows Jefferson Parish to fund repair and maintenance activities directly associated with the same rights of way which are continually used by Cox for delivery of cable modem service. Additionally, as improvement to Cox's own infrastructure becomes necessary to upgrade and improve its existing cable modem service, Jefferson Parish is called upon to become directly involved in permitting and funding additional road and drainage repairs directly associated with those activities. Cox has detailed some of those expenditures in its comment. Jefferson Parish notes that each and every time Cox is called upon to improve its capital facilities in this community there is a direct cost likewise incurred by the parish in permitting, inspecting, and often repairing its own facilities. Cox admits that it recently spent \$150 million dollars to upgrade its cable modem service. The rights of way fee now funds that process in the same way that a landlord uses rental funds to maintain and improve leaseholdings. Furthermore, Cox's comments lead one to believe that Cox is paying franchise fees out of its own pocket, when in fact it is a pass through to their customers. Now Cox essentially argues that they are paying ample money to local governments through cable franchise fees. Cox is trying to use the Commission to renegotiate what it agreed to when they started in the cable business many years ago.

There is a second important function related to delivery of cable modem service now performed by local government at some significant cost. It is the 'eyes and ears' function: the monitor. Jefferson Parish submits that as the cable modem service continues to expand, the need for a local monitor will become more and more valuable to assure the efficient delivery of service. For example, within its comment, Cox documents the problems it experienced with its contractor, Excite@ Home. It describes those problems as potentially catastrophic. Citizens of this community and others served by Cox cable modem internet service were without service entirely or partially for days or weeks. As Cox points out on Page 34 of its comment, its customers complained to them directly. Predictably, Cox customers also complained to local government. As a local governmental authority Jefferson Parish received literally hundreds of complaints from its citizens regarding the downed service. Jefferson registered its concerns with Cox.

Though it serves a purely 'pass through' function with regards to problems like the Excite@Home problem, Jefferson Parish respectfully submits that its local monitoring role is an important checkpoint for a new industry with the ability to directly affect local commerce and vital community services. Like every other service this monitoring function has a cost. That cost is now funded by collection of the franchise fee attributable to delivery of the service. That logical and economical arrangement should be preserved.

Finally, Jefferson Parish notes that it shares some of the concerns identified by Cox in Section VII of its comments. The Commissions' March 14, 2002 proposed rulemaking does create uncertainty regarding collection of franchise fee payments previously collected pursuant to existing contracts. Cox argues that the Commission should assert its jurisdiction to resolve that issue. Jefferson Parish submits that for reasons as discussed above, the Commission should refrain from issuing decisions which affect existing contractual arrangements and should, at a minimum, make any decision regarding franchise fees as prospective only. Specifically, Jefferson Parish submits that any final rulemaking of the Commission should specifically exclude rights and obligations as set out in existing contracts. To do otherwise would encourage disputes among consumers, providers and local governments and would further utilize public resources in counterproductive ways. As the Commission has noted in its own NPRM documents, all parties proceeded in good faith with respect to payment and collection of the fees on the cable modem service revenues. There is no evidence that undue harm would result from allowing existing contract agreements to expire prior to imposition of new rules.

Respectfully submitted,

Jefferson Parish
State of Louisiana

By: s/n: Patricia S. LeBlanc
Patricia S. LeBlanc
Mark J. Jeansonne

